FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 514.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BENJAMIN FAINBLATT and MARJORIE FAINBLATT, individuals doing business under the firm name and styles of Somerville Manufacturing Company and Somerset Manufacturing Company.

BRIEF FOR RESPONDENT IN THE MATTER OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Associate Counsel.

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BRIEF FOR RESPONDENT IN THE MATTER OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The respondent prays that the petitioner, National Labor Relations Board, be denied a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on July 28, 1938, denying the petition of the National Labor Relations Board for enforcement of its order against Benjamin Fainblatt and Marjorie Fainblatt formerly doing business under the name and style of Somerset Manufacturing Company.[1]

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[1] Marjorie Fainblatt was the former owner of the Somerset Manufacturing Company and conveyed her entire interest in the business to Benjamin Fainblatt in the month of January, 1937, and is in no way associated with the Somerset Manufacturing Company. H. R. 147. The record in the court below is in two volumes separately paged. The first volumes is herein referred to as "I. R." and the second as "H. R.".

Opinions Below.

The findings conclusions and order of the National Labor Relations Board (I. R. 467-495) are reported in I. N. L. R. B. 864. The supplemental findings and the amended order (II. R. 227-239) are reported in 4 N. L. R. B. 596. The opinion in the Circuit Court of Appeals for the Third Circuit is reported in 98 F. (2d) 615.

Question Presented.

Whether the National Labor Relations Act may be validly applied to respondent whose business is purely local, who does not purchase any raw materials, who does not sell the finished product, and who neither transports the raw products nor the finished garments.

Statement.

The statement of the case contained in the petition filed herein is somewhat brief and lacks essential details which must be considered before reviewing the opinion below.

THE NATURE OF THE RESPONDENT'S BUSINESS:—Respondent employed fifty-eight employees at the time of the original hearing in this cause. The business was solely that of manufacturing, as stipulated between counsel for the Labor Board and the respondent, I. R. 88-89. The raw material worked upon by the respondent is owned by the Lee Sportswear Company of New York City, and is shipped to the respondent in New Jersey under the direction and expense of the Lee Sportswear Company. It is received at Somerville, New Jersey, by the respondent and it is

then processed into garments. Upon completion of the manufacturing process, the finished garments are turned over to the representative of Lee Sportswear Company at Somerville, New Jersey, who then directs the shipment at the expense of Lee Sportswear Company. The respondent does not, in the course of his business operations, buy or sell raw materials or finished garments. He does not ship, nor does he have facilities for shipment. His is a business solely of manufacturing. I. R. 88-89-90-92. Title to the material remains throughout in the Lee Sportswear Company, I. R. 474.

The record I. 84-91 shows that Benjamin Fainblatt, respondent, was the sole owner of a small garment manufacturing plant in the Borough of Somerville, New Jersey, receiving from time to time orders from a partnership in New York called the Lee Sportswear Company which was engaged in marketing women's sports garments.

The respondent had no interest in the partnership and the partnership firm had no interest in the plant or business of the respondent. The Lee Sportswear Company, hereinafter called the Lee Company, owned all of the tailoring material involved. The Lee Company's material from time to time was cut in New York by Lee Company and shipped in trucks employed by it to the respondent's factory, hereinafter called Somerville. Following the processing from the raw material to the completion of the garment by the Somerville Company, the finished product was turned over at Somerville to trucks employed by the Lee Company for delivery either to the Lee Company at New York or its customers as directed by it. To complete such arrangement the Lee Company maintained a representative in the respondent's factory. I. R. 87.

The material was owned by Lee Company and th respondent had no control, ownership or interest i the material sent by the Lee Company, or in th tailored article. *He was paid for the tailoring wor he did;* no one but himself was interested in his fa tory and the profits arising therefrom were include in his personal income tax return. I. R. 90, 113, 11

Specification of Reasons for Denying the Writ.

The Court below was correct:

1. In holding that the National Labor Relatio Act could not be validly applied to respondent's bus ness.

2. In holding that the business of the respondei is wholly of an intra-state nature.

3. In denying the enforcement of the Board order.

Reasons for Denying the Writ.

Before presenting the reasons for denying the wr in the instant case, it must first be pointed out an brought to this Court's attention, that the petitione has included in its petition, certain allegations whic should not be considered by the Court in deciding th application. The allegations are to be found on pag 12 and 13 of the petition. The statistics appearin therein are self-serving statements which appear fo the first time in this cause. They were never prove by the petitioner in the proceedings before the Tri

Examiner, nor were they used or brought out in any subsequent proceedings.

It is admitted that if the respondent is engaged in interstate commerce, he is subject to the provisions of the National Labor Relations Act. *Washington, Virginia and Maryland Coach Company* v. *National Labor Relations Board*, 85 F. (2d) 990 (C. C. A. 4) affirmed 301 U. S. 142. It is further admitted that if respondent is engaged in both interstate and intra-state commerce, he is not only subject to the Act with respect to the employees actually engaged in the interstate portion of such business, but also with respect to the employees engaged in the intra-state portion of said business, if an interruption in said business would directly affect the interstate business. *Virginia Railway Company* v. *System Federation*, 300 U. S. 515. On the other hand, it is equally clear that if an employer is engaged in purely local activities, and neither buys nor sells in any quantity in interstate commerce, he is not subject to the provisions of the National Labor Relations Act, since the Act applies to employers engaged in interstate commerce, Section 2, para. (6) of the Act, and employers whose business affect interstate commerce, Section 2, par. (7), of the Act. Clearly, respondent is not affected by Section 2, par. (6), of the Act, and the only remaining question is whether or not Section 2, par. (7), is applicable to him.

It is submitted, that where Congress attempts to regulate intra-state commerce or an operation not involving commerce at all, such as manufacturing, the direct effect of the legislation must be to protect

or to prevent injury to, or obstruction of, interstate commerce. The operation of the National Labor Relations Act is so limited by its very terms. (See definition of phrase "affecting commerce" Section 2, par. (7).) This Court in discussing this particular section of the National Labor Relations Act, in the case of *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. ed. 893, said, at page 31:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry, regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power."

The petitioner contends that the labor difficulties in the respondent's shop at Somerville, New Jersey, come within the purview of both Section 2, par. (7) of the National Labor Relations Act, and the above quoted excerpt from the *Jones and Laughlin Steel Corporation* case, *supra*, and in support thereof, *inter alia*, cite the following cases:

Stafford v. *Wallace*, 258 U. S. 495;

Chicago Board of Trade v. *Olsen*, 262 U. S. 1;

National Labor Relations Board v. *Fashion Piece Dye Works, Inc.*, decided November 28, 1938, C. C. A. (3d) 6559;

National Labor Relations Board v. *Hopwood R. Co.*, 98 F. (2d) 97;

National Labor Relations Board v. *Jones and Laughlin Steel Corp., supra;*

National Labor Relations Board v. *Fruehauf Trailer Co.*, 301 U. S. 49;

National Labor Relations Board v. *Friedman-Harry Marks Clothing Co. Inc.*, 301 U. S. 58;

National Labor Relations Board v. *Santa Cruz Fruit Packing Company*, 91 Federal (2d) page 790, affirmed 303 U. S. 453.

It is respectfully submitted that the cases cited above are not applicable to the case at Bar, because the facts in those cases are entirely different than those in the present case. In none of the cases decided by this Court, and relied upon by the petitioner, has this Court stated that every intra-state business necessarily affects and burdens commerce within the purport of Section 2, par. (7) of the National Labor Relations Act. In fact this Court stated in the *Jones and Laughlin* case, *supra*, at page 32:

> "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal Control, and hence to lie within the authority conferred upon the Board, is left by statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

It then becomes necessary to examine the cases relied upon by the petitioner, in order to differentiate them from the case at bar, and to show that the facts in each particular case, were of such nature, that the Court was justified in deciding that the National Labor Relations Act was applicable to their particular business, and therein held that the business operations similar to respondent's in the case at bar were not subject to the Act.

Stafford v. *Wallace, supra;*
Chicago Board of Trade v. *Olsen, supra.*

The petitioner cited the *Wallace* and *Olsen* cases, *supra*, for the purpose of showing that this Court has sustained the power of Congress to regulate businesses that did not involve buying or selling without the State. It is true that under those cases Congress has the power to regulate commerce, merchants and stockyards and grain exchanges. However, those cases involved another point with which the Court was mainly concerned. In the *Stafford* case, Congress, after many investigations, found that individual packing houses were taking advantage of their control over the stockyards and connected facilities to control the price of material and although Congress undertook to regulate the activities of the stockyards in that phase of commerce and dealers in similar subjects, the Court found that although the act of Congress was literally a matter of one regulating a local activity, yet those activities were connected with the general current of commerce *to a substantial degree*. The *Olsen* case involved the Grain Futures Act providing for the direct regulation of the practices of grain exchanges, the primary object being to control dealings in grain futures, and in the first instance, it did so through the device of a prohibitory

tax later invalidated by the Supreme Court in *Hill* v. *Wallace*, 259 U. S. 44. The second attempt to regulate future trading came, after a series of investigations into the abuses in future trading had led to the conclusion that such trading, unless subjected to regulation, *could have disastrous effects upon commerce in grains.* The Court upheld the Grain Futures Act in the *Olsen* case although the activities of the grain exchanges and their members were purely local in character, applying a theory similar to that applied in the *Stafford* case. *The influence of those cases, namely, the Olsen case and the Stafford case, is not as broad as one might think.* In the *Stafford* case the Government was primarily concerned with preventing a conspiracy to restrain interstate trade and setting up some method of punishing such a conspiracy and the Court felt that if Congress could punish for a conspiracy to restrain interstate trade, it was a necessary consequence that it could provide means for preventing such conspiracies from the outset. *Both the Olsen and the Stafford cases dealt with a situation that involved a focal point through which the stream of commerce shifted on its way from producer to the ultimate consumer.* Both decisions took a practical view of commerce and avowed that the power of Congress was not to be defeated by the fact that its objects were merely local incidents of interstate commerce.

National Labor Relations Board v. *Jones and Laughlin Steel Corp., supra.*

Briefly the facts in that case were as follows:

(1) The respondents owned and operated its own mines in various states—the source of its raw mate-

rials; (2) The company owned and operated its own steamboats and other transportation facilities to bring the raw materials to its mills in Pennsylvania; (3) It operated elaborate wholesale outlets for the distribution of its products, at separated points throughout the country, transporting the goods in large part by its own barges and equipment; (4) It manufactured and distributed a widely diversified line of steel, and pig iron, being the fourth largest producer of steel in the United States; (5) It employed approximately 533,000 persons in all of its enterprises.

The Court decided that the National Labor Relations Act was applicable to the respondents therein even though the employees were engaged in intrastate manufacturing, because, as stated in the opinion, page 37:

> "Although activities may be intra-state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *A. L. A. Schechter Poultry Corp.* v. *United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Id. The question is necessarily one of degree. * * *." Again at page 41: "Giving full weight to respondent's con-

tention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's farflung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

Can one, by any stretch of imagination, say that a strike of respondent's fifty-eight employees in the case at bar, would have the same effect as set forth by this Court in the *Jones and Laughlin Company* case, *supra?* The obvious answer is, that it would not.

National Labor Relations Board v. *Fruehauf Trailer Company, supra.*

Briefly the facts in that case were as follows:

(1) The respondent was a corporation organized under the laws of Michigan and engaged in the manufacture, assembly, sale and distribution of commercial trailers and of trailer parts and accessories; (2) Respondent's plant, located in Detroit, was the largest concern of its kind in the United States; (3) Respondent maintained thirty-one branch sales offices in twelve different states and had distributors and dealers in the principal cities of the country; (4) A wholly owned subsidiary operated in Toronto, Canada, where sales were made and considerable assembly work was done with materials obtained from the Detroit plant; (5) Respondent imported more than fifty per cent of raw materials that went to make up the finished product; (6) More than eighty per cent of its sales were shipped out of the state and its sales amounted to approximately $3,300,000 per annum. Its nearest competitor sold only thirty per cent of that amount.

This Court, after setting forth the above facts, briefly gave its opinion as follows, page 57:

> "The questions relating to the construction and validity of the Act have been fully discussed in our opinion in No. 419, the *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.* decided this day. We hold that the principles there stated are applicable here."
>
> *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Company, Inc.*, *supra*.

Briefly the facts in that case were as follows:

(1) Respondent was a Virginia corporation with

its plant at Richmond, where it engaged in the purchase of raw materials and the manufacture, sale and distribution of men's clothing; (2) 99.57 per cent of their raw materials came from states other than Virginia; (3) 82.8 per cent of its finished product was purchased by customers outside the state; (4) Respondent maintained a sales office and show room in New York City through which fifteen or twenty per cent of its total sales was made; (5) Respondent's sales amounted to approximately $2,000,000 for the year 1935.

Here again, this Court, after reciting the above facts, gave its reasons for its opinion in this language, page 75:

> "For the reasons stated in our opinion in No. 419, *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, decided this day, we hold that the objection raised by respondent to the construction and validity of the National Labor Relations Act are without merit."
>
> *National Labor Relations Board* v. *Santa Cruz Fruit Packing Company, supra.*

Briefly, the facts in this case were as follows:

(1) The respondent was engaged in the manufacture of packing fruits and vegetables in the State of California and also sold and distributed its finished products throughout the United States. All of its raw materials were obtained in the State of California; (2) Respondent maintained two factories in two different cities in the State of California, one of which was devoted solely to packing and the other devoted to packing, shipping and distributing; (3) Thirty-nine per cent of its finished product was di-

rectly shipped in interstate commerce and sixty-one per cent in intra-state commerce; (4) Respondent was one of the largest fruit packing concerns in the United States.

The above case was decided by the Circuit Court of Appeals for the Ninth Circuit, *supra*, and it was therein held that the National Labor Relations Act was applicable to the respondent, based upon the reasonings in the *Jones and Laughlin* case, *supra*. It was pointed out by the Court; that the thirty-nine per cent of its products which were shipped by it in interstate commerce, was a sufficiently substantial amount to warrant the application of the doctrines set forth in the *Jones and Laughlin Steel Corporation* cases *supra*.

It can readily be seen upon an examination of the facts in the above cases as compared with the facts in the case at bar, that they are wholly different and the law applicable to the cases aforesaid cannot be applied to the respondent in this case. The respondent's contention has received support and is best illustrated in a recent decision in *National Labor Relations Board* v. *Fashion Piece Dye Works, Inc.*, decided November 28, 1938, C. C. A. (3d), No. 6559 in which a differently constituted Court in the Third Circuit distinguished the case at bar and upheld the jurisdiction of the Board:

National Labor Relations Board v. *Fashion Piece Dye Works, Inc., supra.*

Briefly, the facts in that case were as follows:

(1) The respondent was a corporation organized under the laws of New Jersey operating a plant in Pennsylvania for the finishing and dyeing of rayon

and acetate goods belonging to its customers; (2) Fifty to ninety per cent of the goods processed by the respondent was received from points outside of Pennsylvania and transported to the Easton, Pennsylvania, plant in *trucks owned and operated by the respondent*; (3) Ninety per cent of the finished goods are delivered directly to the respondent's customers in New York City *by the respondent's own trucks.*

The respondent in the *Fashion Piece Dye Works* case relied upon the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar, in resisting the order of the National Labor Relations Board. But that Court distinguished the two cases in the following language:

> "The respondent relies upon *National Labor Relations Board* v. *Fainblatt*, 98 F. (2d) 615, in which this Court, one judge dissenting, held that a New Jersey tailoring concern which was engaged exclusively in finishing garments for a New York concern from cloth owned and furnished by the latter was not subject to the provisions of the Act. *That case, however, is clearly distinguishable, and is not controlling here because it appears that Fainblatt engaged in no interstate transportation whatever*, whereas in the case before us the respondent itself transported at least fifty per cent of the textiles to be processed into the State and the same percentage of the finished product out of the State."
>
> *National Labor Relations Board* v. *Hopwood R. Co., supra.*

The facts in that case were as follows:

(1) The respondent was engaged in repairing milk and ice cream containers; (2) Twenty-three per cent

of the containers on which work was done was transported *in the respondent's trucks* from and to states other than the state where the work was performed.

The Court properly held that the respondent was engaged in interstate commerce within the purview of Sec. 2, para. (6) of the National Labor Relations Act, because the transportation in its own trucks of the goods it processed was an essential part of the business.

The respondent in the case at bar did not purchase any raw materials either within or without the state; he did not sell any of his finished products either within or without the state; he took no part in transporting the goods either within or without the state; he was engaged solely in the performance of certain labor upon an unfinished garment.

According to the constitutional standards set by all of the above described cases, decided under the National Labor Relations Act, the statutory power of the National Labor Relations Board to prevent labor practices which "affect commerce" extends to regulation of activities which "have such a close and substantial relation to interstate commerce, that their control is essential or appropriate to protect that commerce from burdens or obstructions." *Jones and Laughlin Steel Corporation, supra.* In this category this Court has placed employers in nationally important industries whose plant operations were wholly within a state, but who nevertheless shipped, predominantly in interstate commerce, products fabricated from raw materials which were, to a large extent, imported from other states. For example, the National Labor Relations Board has assumed jurisdiction of companies which obtained a negligible quantity of

raw materials or equipment from other states, but which ship out much of their finished product, *Idaho-Maryland Mines Corp.*, C-260, 4 N. L. R. B. No. 97 (Jan. 10, 1938); *Clover Fork Coal Co.*, C-243, 4 N. L. R. B. No. 3 (Nov. 27, 1937); *Greensboro Lumber Co.*, 1 N. L. R. B. 629 (1936); *Campbell Machine Co.*, R-249, 3 N. L. R. B. No. 79 (Oct. 4, 1937); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th, 1937). It has assumed jurisdiction over large wholesale agencies, which distribute wholly within a state, products imported by those agencies from other states, *Suburban Lumber Co.*, C-162, 3 N. L. R. B. No. 17 (Aug. 2, 1937); *Danahy Packing Co.*, R-224, 3 N. L. R. B. No. 30 (Sept. 17, 1937); but to date this Court has not assumed jurisdiction over an employer whose business is purely local, as in the case at bar.

This Court has assumed jurisdiction of Electric Power Corporations which neither import nor export any significant amount of raw materials, equipment, or power, *Consolidated Edison Company of New York, Inc.*, Nos. 19, 25, Decided Dec. 5, 1938. The petitioner places great stress upon this case, because that company neither imported nor exported large quantities of raw materials, etc., however, this Court was justified in holding that a strike in Consolidated Edison Company's plant would burden and affect commerce within the purview of Sec. 2, par. (7) of the Act. As therein pointed out, the strike in the Consolidated Edison Company's Plants, would result in serious derangement not only of interstate facilities, such as telephones, telegraphs and railroads, but also of businesses making interstate shipments. The potential effect of such a strike was depicted as equivalent to

simultaneous strikes by the employees of all industries dependent for their continued operation upon power furnished by the utilities before the Board.

The petitioner has completely failed either at the original hearing before the Board or in any of its subsequent proceedings, to show that a strike in the respondent's plant of fifty-eight employees, would substantially affect and burden the flow of commerce between the states. In fact, a reading of the testimony will reveal that the representative of the Le Sportswear Company testified, that during the period of the strike at respondent's plant in Somerville, their business was in no wise affected (II. R. 181-182). They simply shipped their goods to other plants in the same line of business. Can we say that this Court in its decision in the *Jones and Laughlin Steel Company* case, *supra*, intended to hold that the National Labor Relations Act was applicable to a type of business carried on by these respondents? If so, what need was there for the Court saying as it did on page 37:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote, that to embrace them in view of our complex society would effectively obliterate the distinction between what is national and what is local, and create a completely centralized government."

This Court must have had in mind, a business such as operated by the respondents herein, which is purely local in character and which, even though shut down by strike or otherwise for a lengthy period of time,

would in no wise affect the flow of women's sportswear through the states. To hold otherwise would of necessity "obliterate the distinction between what is national and what is local and create a completely centralized government."

From a speculative viewpoint almost every business participates, to a limited extent, at least, in the general current of commerce. This participation is magnified in those industries which import and export materials before and after their manufacturing or other operations. To hold that the respondent in the instant case may be classified with the decisions involved in the cases cited and relied upon by the petitioner herein, would, in effect, remove all speculation. This court never intended to permit national control over every business. Manufacturing in itself is not commerce.

Kidd v. Pearson, 128 U. S. 1, 20, 21, 31 L. ed. 346, 350, 351, 9 S. Ct. 6, 2 Inters. Com. Rep. 232;

United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 407, 408, 66 A. L. R. 762;

Oliver Iron Min. Co. v. Lord, 262 U. S. 172, 178, 67 L. ed. 929, 935, 43 S. Ct. 526;

United Leather Workers International Union v. Herkert and M. Trunk Co., 265 U. S. 457, 465, 68 L. ed. 1104;

Industrial Asso. v. United States, 268 U. S. 64, 82, 69 L. ed. 849, 855, 45 S. Ct. 403;

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551;

A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. page 547, 79 L. ed. 1580, 55 S. Ct. 97 A. L. R. 947;

Carter v. Carter Coal Co., 298 U. S. 238, 304, 317, 327, 80 L. ed. 1160, 1185, 1192, 56 S. Ct. 855.

CONCLUSION.

Respondent respectfully submits that the lower Court was justified in holding that the respondent cannot be drawn into the network of national control under the constitutional power to "regulate commerce between the states," but that the respondent was engaged solely in an intra-state business which is not subject to regulation by Congress.

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December, 1938.